I now come to the second applicant's (the purchaser's) application. In *Eng Mee Yong* it was ruled (at p. 215)

> It is otherwise when the applicant under s. 327 is someone other than the caveatee. He has no registered title to rely upon as *prima facie* evidence of his interest in the land. It is for him to begin by satisfying the Court that there are sufficient grounds in fact and law for treating him as a person claiming such an interest in the land as would, if it were established, make him aggrieved by the existence of the caveat.

The second applicant's statement in their affidavit ("Second Affidavit" in encl. 2) to the effect that they had entered into Sale and Purchase Agreements with the first applicant in respect of the lands is never disputed by the respondent. Learned Counsel for the respondent submits that there was a collusion between the first applicant and the second applicant; however, there is nothing in the affidavits to support such an allegation. Based on the reasons which I have given above in respect of the first applicant's application, it also follows that in the case of the second applicant, the caveator has also failed to discharge the onus that lies upon them.

MBf FINANCE BERHAD (FORMERLY KNOWN AS MALAYSIA BORNEO FINANCE CORPORATION (M) BHD.)

v.

TING KAH KUONG & ANOR.

HIGH COURT, KUCHING
DATO' HJ. ABDUL KADIR BIN SULAIMAN J.
[SUIT NO. KG. 218 OF 1990]
24 JUNE 1993

PRACTICE & PROCEDURE: Appeal - O. 56 r. 1 of the Rules of the High Court 1980 - Judgment entered for plaintiff under O. 14 - Counterclaim struck out under O. 18 r. 19 & O. 92 r. 4 of the Rules of the High Court - Hire purchase agreement between plaintiff & first defendant and guarantee agreement with second defendant - O. 14 application - Defence of both defendants - The agreements void and unenforceable - Section 1(2) Hire Purchase Act 1967, s. 4 Hire Purchase Registration Ordinance (Cap 71) of Sarawak, s. 35(5) Companies Act 1965, s. 3 Bill of Sale Ordinance (Cap 68) Sarawak - Loss not mitigated - Section 75 Contracts Act 1950, payment clauses not signed - Whether triable issues; alternative contentions of second defendant - Guarantee agreement void - In the nature of indemnity - Section 22 Hire Purchase Act 1967 - Material misrepresentation in the agreement - Whether triable issues; O. 18 r. 19 of the Rules of the High Court - Application to strike out counterclaim - Counterclaim for refund of payment made pursuant to s. 30(2) Hire Purchase Act - For order to compel plaintiff to repossess goods etc - For refund of payment made by another firm - Whether disclosed reasonable cause of action - Whether frivolous and vexatious.

This was an appeal by the first and second defendants under O. 56 r. 1 of the Rules of the High Court 1980 ('the RHC') in respect of the decision of the deputy registrar, entering judgment for the plaintiff against the defendants under O. 14 and striking out the counterclaim of the first defendant under O. 18 r. 19, and ordering costs against the defendants.

The plaintiff was a licenced finance company incorporated in Malaysia. Its business was run under the name of Malaysia Borneo Finance Corpn. (M) until 19 December 1985 when by virtue of a certificate of incorporation on the change of the name of company, the name of the plaintiff company was changed to MBf Finance

Bhd. The plaintiff entered into a hire purchase agreement ('the agreement') with the first defendant on 7 April 1989, executed in Kuching through its branch office there, for a hire purchase price of RM 319,950. The subject matter of the agreement comprised of 2 units planers, 1 unit scraper machine, 2 units automatic turning lathes and 4 units forklifts. The heading of the agreement form was under the old name of the plaintiff company. However, a copy of the agreement sent to the first defendant on a subsequent date had the new name at the top of the document.

The second defendant, an employee of the first defendant, was the guarantor to the agreement, the guarantee agreement being executed on the same day as the agreement. The guarantee agreement was in the new name of the plaintiff.

On the first defendant defaulting in paying the monthly rental under the agreement, the plaintiff sued both the defendants for the amount due and the agreed interest on the overdue hire rentals.

The first defendant filed his defence and counterclaim. He contended that the agreement was invalid and unenforceable on a number of grounds, that the plaintiff lacked title to the goods, that the plaintiff should have repossessed the goods and tried to mitigate its loss and that the clauses regarding certain payments were not incorporated into the agreement.

The first defendant counterclaimed, first, for a sum of RM53,664 being payments made to the plaintiff under the agreement as a consequent of the plaintiff's lack of title, as a debt due to him under s. 30 of the Hire Purchase Act 1967 ('the Act'). In the alternative, the first defendant prayed for various orders, including that an order be made compelling plaintiff to repossess the said goods and to dispose of them to mitigate the plaintiff's loss. Further and in the alternative, the first defendant claimed the refund of RM60,000 paid to the plaintiff in respect of dealings involving the plaintiff and the first defendant trading under the name and style of Borneo Welded Mesh.

The defence of the second defendant was, in essence, the same as that of the first defendant on the voidness and unenforceability of the agreement. In the alternative, she contended that the guarantee agreement was in the nature of indemnity, and was void being in contravention of s. 22 of the Hire Purchase Act, and also as it contained material misrepresentation about the hire purchase agreement, regarding the address of the first defendant.

Held:

A. *Regarding the application for summary judgment under O. 14 Rules of the High Court.*

The defendants had failed to raise any triable issues to defeat the plaintiff's application.

1. The agreement was valid.

(a) The first defendant intended to contract with the company of the plaintiff and had so contracted by his signing of the agreement under the old name, though at the time the company had already changed its name. Certain documents, such as the invoice dated 30 April 1989 from the dealer of the goods, the subject matter of the agreement, addressed to MBf Finance, Kuching, for the account of the first defendant, and the guarantee agreement, showed the connection between the first defendant and the plaintiff company in relation to the goods.

(b) The agreement was not governed by the Hire Purchase Act. According to s. 1(2) of the Act, it is applicable only in respect of hire purchase agreements relating to the goods specified in the First Schedule. The goods the subject matter of the agreement were not within the First Schedule. Forklifts are not motor vehicles as listed in the First Schedule.

Therefore, the various defences concerning the Act became non-issue.

(c) Though the agreement was not a hire purchase within the province of the Hire Purchase Act, the agreement had been duly registered pursuant to the Hire Purchase Registration Ordinance (Cap 71) of Sarawak. Section 4 of the Ordinance requires any hire purchase instrument involving movable property, other than an instrument within the province of the Hire Purchase Act, to be registered.

On the other hand, the Ordinance does not require a guarantee agreement arising therefrom to be registered.

(d) The agreement had been duly executed. Though the agreement was not signed by the directors of the plaintiff nor the common seal of the plaintiff attached thereto, it had been signed by a representative of the plaintiff who had implied authority to do so, and the agreement was of the nature that no seal of the company was required, as provided by s. 35(5) of the Companies Act 1965.

(e) The agreement was not a bill of sale and therefore was not void for not having been attested and registered as required by the Bill of Sale Ordinance (Cap 68) of Sarawak.

A bill of sale is defined by s. 3 of this Ordinance as including agreements for the hire of personal chattels entered into for the purpose of securing the repayment to the lessor of such chattels of money advanced by him to the hirer, and it connotes the exclusive title to such chattels being in the lessor. Personal chattels are defined to include goods capable of complete transfer by delivery.

But in the case of the agreement between the plaintiff and the first defendant, the title to the goods the subject matter of the agreement was not exclusive to either. It was legally vested jointly in both the parties according to the proportion of the payments made by them.

2. There was no failure on the part of the plaintiff to mitigate the loss pursuant to s. 75 of the Contracts Act 1950. In the circumstances of the case, the plaintiff cannot be faulted for not taking possession of the goods. In any event, s. 75 of the Contracts Act was irrelevant in this respect as the section refers to cases of liquidated damages and penalty imposed in the contract between the parties in the event of breach. The plaintiff was still entitled to receive reasonable compensation, the amount of reasonable compensation depending on whether the plaintiff was required to mitigate his loss.

3. The clauses relating to the payment of the initial deposit and certain other payments to be made by first defendant formed part and parcel of the agreement. Though no signatures or initials appeared against the respective clauses, the parties had signed the last page of the agreement.

4. Regarding the alternative defences of the second defendant

a. The guarantee agreement was not in the nature of an indemnity.

The second defendant had undertaken to jointly and severally guarantee all obligations of the first defendant under the agreement, and to jointly and severally indemnify the plaintiff against all loss or damage the plaintiff may sustain under the agreement and her liability was not in any way to be discharged etc. by the invalidity or unenforceability of the agreement.

b. There was no misrepresentation regarding the address of the first defendant.

B. *Regarding the application to strike out under O. 18 r. 19 of the Rules of the High Court.*

The whole counterclaim of the first defendant was without any basis.

1. That part of the counterclaim, which hinged on his contention that the plaintiff lacked title in the goods and therefore the sum paid by him to the plaintiff under the agreement was a debt due to him under s. 30(2) of the Hire Purchase Act, disclosed no reasonable cause of action and was vexatious. As has been ruled earlier, the Act was not applicable to the agreement in question and that issue, therefore, did not arise.

2. That part of the first defendant's counterclaim, in relation to the prayers for various orders, was sought on the basis that the plaintiff had a duty to mitigate its alleged loss, and in the light of what had been said on the issue earlier, was clearly unarguable, frivolous and vexatious.

3. That part of the counterclaim of the first defendant in respect of dealings between the plaintiff and Borneo Welded Mesh was clearly vexatious and an abuse of the process of court.

Borneo Welded Mesh was a stranger to the present action, and the first defendant could not counterclaim on its behalf. Ting Kah Kuong was

being sued in the capacity of trading under the style of Forward Enterprise. Though he was concerned with firms other than Forward Enterprise and though the plaintiff had dealings with the other firms, as it was Forward Enterprise which was being sued, it was not proper for Ting Kah Kuong to counterclaim against the plaintiff over the plaintiff's dealings with his other firms. Ting Kah Kuong might be the same person in all the firms concerned but the identity of each of the firms was distinct.

[*Appeal dismissed with costs to the plaintiff to be taxed unless agreed. Order of the deputy registrar for entry of final judgment under O. 14 against the first and second defendants affirmed. Whole of the counterclaim of the first defendant struck out].*

Legislation referred to:
Companies Act 1965, s. 23(6)
Contracts Act 1950, s. 75
Hire Purchase Act 1967, ss. 1(2), 7, 22, 30(2), 35(5)
Hire Purchase Registration Ordinance of Sarawak (Cap 71) s. 4
Rules of the High Court 1980, O. 14 r. 19, O. 18 r. 19, O. 56 r. 1, O. 92 r. 4

For the plaintiff/respondent - S.T. Wong; M/s. Loke, King & Co.
For the defendants/appellants - Arthur Lee; M/s. Arthur Lee & Co.

JUDGMENT

Hj. Abdul Kadir Bin Sulaiman J:
This is an appeal by the 1st and 2nd defendants under O. 56 r. 1 of the Rules of the High Court 1980 ("the RHC") in respect of the decision of the learned Deputy Registrar given on 20 August 1991:

(a) entering judgment for the plaintiff against the 1st and 2nd defendants under O. 14 of the RHC for the sum of RM198,711.88 with interest thereon at the rate of 2% per calendar month from 13 November 1990 until date of full and final settlement;
(b) striking out the counterclaim of the first defendant under O. 18 r. 19 and under O. 92 r. 4 of the Rules of the High Court in respect of the refund to the first defendant by the plaintiff of the sum of RM53,664, interest and costs purported to have been paid under a void hire purchase agreement entered with the plaintiff, and an order for the plaintiff to repossess the subject matter of the agreement and dispose it off to mitigate the loss suffered by the first defendant and costs; and
(c) ordering the 1st and 2nd defendants to pay costs of plaintiff's action and this application for summary judgment.

The grounds of the plaintiff's application before the learned Deputy Registrar are that:

(a) the 1st and second defendants have no defence to the plaintiff's action; and
(b) the first defendant's counterclaim discloses no reasonable cause of action, is frivolous and vexatious, may prejudice, embarrass or delay the fair trial of the action or is an abuse of the process of the Court.

The plaintiff is a licenced finance company incorporated in Malaysia having its registered office in Kuala Lumpur and a branch office at Kuching. The business was run under the name of Malaysia Borneo Finance Corporation (M) Berhad until 19 December 1985 when by virtue of a certificate of incorporation on change of name of company dated 19 December 1985 as exhibited in KKH 1 to the affidavit of Kong Kek Hing affirmed on 22 August 1991 in support of the plaintiff's application, the name of the plaintiff company was changed to MBf Finance Berhad. In the course of its business, on 7 April 1989 the company entered into a hire purchase agreement ("the agreement") with the 1st defendant as evidenced by KKH 2 to the same affidavit. The agreement was executed in Kuching through its branch office here. The agreement is on a printed form GEN/HP. The heading of the agreement form is under the old name of the plaintiff company. The party representing the plaintiff company in the agreement is still in the old name of the company. The name of the addressee in the delivery receipt appearing on the last page of the agreement is still in the old name of the plaintiff company. Therefore, looking at the agreement in KKH 2 it would appear as if the plaintiff company has not changed its name at all despite the fact that its name had been changed since 19 December 1985 pursuant to the certificate issued by the Registrar of Companies as evidenced in KKH 1 of the same affidavit of the plaintiff in support of its application. It is clear therefore, that notwithstanding the

change of name of the plaintiff company the plaintiff still used the old form for purposes of its agreement with a third party.

After the execution of the agreement, on a subsequent date a copy of the said agreement was sent to the first defendant. However, on the 1st defendant's copy there being chopped on the document, the new name of the plaintiff company with its Kuching branch address on the top of the document just below the printed heading of the document in the old name of the plaintiff company. Otherwise the document is identical with the document in KKH 2 kept by the plaintiff. The 1st defendant's copy of the agreement is evidenced by TKK 1 to the affidavit in opposition of the 1st defendant affirmed on 26 September 1991.

The agreement between the plaintiff and the 1st defendant is for a hire purchase price of RM319,950. The balance payable under the agreement is RM238,450 after deducting the initial payment made in the sum of RM81,500. The sum of RM238,450 inclusive of 25.5% of term charges was agreed to be paid by 35 monthly rentals of RM6,624 and one final rental of RM6,610 commencing on 10 May 1989 and thereafter on or before the 10th day of each succeeding month until the said 36 rentals have been paid in full. The goods, the subject matter of the agreement is listed in Annexure "A" to the agreement comprising of 2 units planers, 1 unit scraper machine, 2 units automatic turning lathe and 4 units forklifts. The cash price of those goods was quoted as RM271,500. In the agreement, the address of the first defendant is given as No. 195, Lorong 2/2, Hui Sing Garden, Kuching. The agreement states that the goods will be kept at Lot 1083, Bintawa Industrial Estate, Kuching. Clause 2 of the agreement states that in default of punctual payment the 1st defendant shall pay interest on any overdue hire rental or other payments at the rate of 2% per calendar month. Clause 5(a) provides that if the first defendant shall make default in punctually paying the initial payment or any of the hire rentals or any other sum payable under the agreement (whether demanded or not), then it shall be lawful for the plaintiff without notice to terminate the hiring or by written notice sent to or left at the 1st defendant's last known address forthwith to determine the hiring and the 1st defendant shall forthwith at its expense deliver up the goods to the plaintiff and the plaintiff and its servants or agents shall be entitled without any notice to enter upon any premises where the said goods may be and seize and take possession thereof and to recover all charges, costs and expenses incurred in connection therewith.

The 2nd defendant is the guarantor to the agreement as evidenced by KKH 3 to the affidavit of the plaintiff in support of this application. It was executed on the same day as the agreement. In this guarantee agreement, the name of the plaintiff is in its new name that is, MBf Finance Berhad. It recited the Hire Purchase Agreement No. HPKC/NS/455/10/89/TS which is the agreement in KKH 2. However, the address of the 1st defendant is given as Lot 1083, Section 66, Pending Industrial Estate, Kuching and not 195, Lorong 2/2, Hui Sing Garden, Kuching as the address given in KKH 2. Pending Industrial Estate is also known as Bintawa Industrial Estate and the Lot No. in the address is the Lot No. in the address given in KKH 2 being the place where the said goods would be kept. In the particulars of the guarantor, it is stated in the guarantee agreement that 1st defendant is the employer of the guarantor/2nd defendant which address is given as Lot 1083, Bintawa Industrial Estate, Kuching. In the guarantee agreement the second defendant jointly and severally guaranteed upon written demand being made to her by the plaintiff the due and punctual payment of all sums which may become due to the plaintiff under or arising out of the hire purchase agreement and the due performance and observance by the 1st defendant of each and every term and condition in the said hire purchase agreement to be performed and observed by the first defendant. The second defendant also will jointly and severally on written demand indemnify the plaintiff against all loss or damage that the plaintiff may sustain under the hire purchase agreement.

The 1st defendant defaulted in paying the monthly rentals under the agreement with the plaintiff. The plaintiff sued both the defendants pursuant to the two agreements and claimed for a sum of RM198,711.88 as the amount due as at 12 November 1990. This is contained in the amended statement of claim of the plaintiff dated 24 June 1991. One of the items include the agreed interest on overdue hire rentals to the extent of RM13, 251.98.

On 29 July 1991 the 1st defendant filed its defence and counterclaim. He admitted signing the agreement with Malaysia Borneo Finance Corporation (M) Berhad, that is, the old name of the plaintiff. However, it contends that the agreement and the terms contained therein are invalid and unenforceable against him:

(a) for failure to comply with various provisions of the Hire Purchase Act 1967;
(b) the term charge of 25.5% is in excess of the rate prescribed by the 1967 Act;
(c) failure to register the agreement under the Hire Purchase Registration Ordinance of Sarawak (Cap 71);
(d) the agreement was not duly executed in accordance with the Companies Act 1965;
(e) the interest rate of 2% per calendar month levied upon overdue instalments is unlawful;
(f) various clauses and terms in the agreement were not duly accepted or agreed upon to be signified by them;
(g) the said goods were sold to the plaintiff by the dealer and the 1st defendant paid the initial payment of RM81,500 thereby giving no title to the said goods in the plaintiff pursuant to s. 7 of the Hire Purchase Act 1967;
(h) RM190,000 subsequently paid by the plaintiff to the dealer was in fact a loan to the dealer by way of the dealer pledging first defendant's goods as security to the plaintiff without interest, in return for which the dealer granted title and property in the goods to the 1st defendant notwithstanding the fact that the goods were intended for sale to the plaintiff;
(i) the hire purchase agreement is a bill of sale and void for non-attestation and registration under the Bill of Sale Ordinance of Sarawak (Cap 68); and
(j) the plaintiff has failed to mitigate the loss pursuant to s. 75 of the Contracts Act 1950.

The first defendant admitted receiving the letter of demand for payment from the plaintiff but did not pay as in law they are not due to the plaintiff.

The first defendant counterclaims against the plaintiff for a sum of RM53,664 being payments made to the plaintiff under the agreement as a consequent of the plaintiff's lack of title. The sum being debt due to it under s. 30 of the Hire Purchase Act 1967. In the alternative, the 1st defendant claims that he is entitled to an order that the plaintiff repossesses the said goods and disposes of the same to mitigate the plaintiff's loss. Secondly, the first defendant claims against the plaintiff in respect of transaction involving the plaintiff and the 1st defendant trading under the name and style of Borneo Welded Mesh.

In the circumstances, the 1st defendant counterclaims against the plaintiff for:

(a) the sum of RM53,664;
(b) interest thereon at the rate of 8% p.a. from date of judgment till date of full and final payment; and
(c) costs.

In the alternative:

(a) for an order that the plaintiff be compelled to repossess the said goods;
(b) for an order that the plaintiff do dispose the said goods at the best market price;
(c) for an order that the plaintiff accounts and pays to it the sums representing the difference between the sums due to the plaintiff and the total sum paid by it and proceeds of sale of the said goods;
(d) interest on the sum in (c) above at the rate of 8% p.a. from date of judgment till date of full and final settlement; and
(e) costs, and

Further and in the alternative, in relation to the transaction between the plaintiff with Borneo Welded Mesh abovementioned:

(a) the refund of RM60,000 paid to the plaintiff.
(b) interest thereon at the rate of 8% p.a. from date of judgment till date of full and final settlement; and
(c) costs.

On 1 August 1991 the 2nd defendant filed her amended defence dated 31 July 1991. In essence, except for a few other matters, the defence of the 2nd defendant is the same as that of the 1st defendant on the voidness and unenforceabililty of the agreement between the plaintiff and the 1st defendant. However, in the alternative, the 2nd defendant contends:

(a) that the guarantee agreement is in the nature of indemnity and not a guarantee and the same is void being in contravention of s. 22 of the Hire Purchase Act 1967; and

(b) that the guarantee agreement is void as it contained material misrepresentation about the hire purchase agreement. The misrepresentation is in regard to the address of the 1st defendant. She admitted receiving the letter of demand for payment from the plaintiff but did not pay as in law they are not due to the plaintiff.

By a Summons In Chambers dated 22 August 1991 the plaintiff applies under the provisions of O. 14, O. 18, r. 19 and O. 92 r. 4 of the Rules of the High Court. The learned Deputy Registrar who heard the application made the order against the defendants as mentioned in paragraph 1 above, hence the appeal by both the defendants.

Application against 1st and 2nd defendant under O. 14 RHC:

The plaintiff's application is supported by:

(a) affidavit of Kong Kek Hing affirmed on 22 August 1991;
(b) affidavit of Robin Wee Ewe Teck affirmed on 28 September 1991;
(c) affidavit in reply of Kong Kek Hing affirmed on 8 November 1991;
(d) further affidavit in reply to Kong Kek Hing affirmed on 26 May 1992; and
(e) affidavit of Wong Siong Tung affirmed on 26 May 1992.

To oppose the plaintiff's applications, the 1st defendant filed the following affidavits:

(a) affidavit in opposition of Ting Kah Kuong affirmed on 26 September 1991;
(b) affidavit in opposition of Ting Kah Kuong affirmed on 30 September 1991; and
(c) affidavit in opposition of Ting Kah Kuong affirmed on 23 March 1992.

No affidavit was filed by the 2nd defendants or on her behalf against the plaintiff's application.

In the light of the defendants defence that the 1st defendant entered into the agreement with Malaysia Borneo Finance Corporation (M) Berhad (the old name of the plaintiff company) and according to Ting Kah Kuong's affidavit in opposition of 26 September 1991 at paragraph 6 thereof that todate he had not received any notice of change of name, or notice of legal assignment of the purported hire purchase agreement with Malaysia Borneo Finance Corporation (M) Berhad, I have first to decide whether there exists a triable issue on the matter. To constitute a triable issue, the issue raised must be relevant. It is conceded by the learned counsel for the plaintiff in his submission in the hearing before the learned Deputy Registrar and at this appeal that Malaysia Borneo Finance Corporation (M) Berhad was the former name of the plaintiff. In effect what the defendants are saying is that Malaysia Borneo Finance Corporation (M) Berhad and MBf Finance Berhad are two different entities and he entered into the agreement with the former and not with the plaintiff. The learned Counsel submitted that in the light of s. 23(6) of the Companies Act 1965, the change of name in the circumstances of this case does not affect the identity of the company. Only the name changes but the identity of the company remains. The learned Deputy Registrar in her decision seems to agree with the submission of the learned Counsel for the plaintiff that by virtue of s. 23(6) of the Companies Act 1965 the change of name does not affect the identity of the plaintiff or its rights and obligations and therefore held the issue to be non-triable. Section 23(6) states as follows:

> (6) A change of name pursuant to this Act shall not affect the identity of the company or any rights or obligations by the company or render defective any legal proceedings by or against the company, and any legal proceedings that might have been continued or commenced by or against it by its former name may be continued or commenced by or against it by its new name.

What this sub-section in effect means is that the mere change of the name of a company does not affect the identity of the company. The identity of a company is governed by its constitution. For so long as this is not changed, the identity remains. The name given to a company is merely to distinguish it from any other companies, so that no two companies will be having the same name in order for one not to be mistaken for the other in the dealings with a third party. Just like a man having a name given to him at birth, the mere change of his name taking place subsequently will not make him into a different man. The change of name of a company will not absolve it of any rights and obligations subsisting before the change takes effect. Whatever legal proceedings there

was by or against the company before the change will not be rendered defective. However, since the change of name has taken effect any legal proceedings pending or might have been commenced by or against it but for the change of name, such legal proceedings may be continued or commenced by or against it by its new name. So, what has changed consequent upon the change of name of a company is in the title to the action in as far as the name of the company is concerned. This is pretty obvious because the old name of the company has ceased to exist on account of the change taking place. But in the present matter before the Court, the situation is different. The company of the plaintiff acquired its new name in 1985, that is, some 3 years and 4 months before the existence of the agreement between the plaintiff and the 1st defendant on 7 April 1989. The defendants could not quarrel if the plaintiff in the agreement is cited as MBf Finance Berhad instead of Malaysia Borneo Finance Corporation (M) Berhad which name had ceased to exist since 19 December 1985. As such, have the defendants by their pleadings raised a triable issue so as to defeat the plaintiff's application under O. 14? To answer this, one needs to look at the surrounding circumstances leading to the signing of the agreement. At the time of the signing of the agreement and the guarantee agreement on 7 April 1989 by the 1st and 2nd defendant respectively, were they conscious that they were in fact entering into the agreements with the company by whatever name it was called?

To that extent, exhibits KKH 10, 11 and 12 annexed to the affidavit in support of the plaintiff affirmed on 22 August 1991 are relevant to consider. The said goods the subject matter of the agreement were initially the property of Hup Seng Hin Machinery Trading, Kuching ("the dealer"). KKH 10 is an invoice dated 30 April 1989 from the dealer addressed to MBf Finance, Kuching **for the account of the 1st defendant** (emphasis is mine). The total cost for the said goods is RM271,000 less the down payment of RM81,500 leaving a net balance of RM190,000. At the bottom of the invoice is a note: Terms 3 years under H.P. to MBf Finance. So, as at that date the 1st defendant was not a stranger to the invoice notwithstanding the remark "Terms 3 years under H.P. to MBf Finance" appearing at the bottom of the said invoice. If not, why should it be for the account of the 1st defendant? So, there was then the connection between the 1st defendant and the plaintiff company in relation to the said goods.

KKH 11 has as its hearing "Dealer's Invoice" and it is dated 7 April 1989 which is the date of the agreement. It is addressed to the plaintiff referring to Annexure "A" which comprised of goods in Annexure "A" to the agreement. The total amount in each Annexure "A" is RM271,500. On KKH 11 itself, the cash price of the goods is quoted as RM271,500 less deposit of RM81,000 (which is the amount of the down payment in KKH 10 leaving a balance of RM190,000. In the "Dealer's Invoice" there is a clause as follows:

> I/We agree to sell the Goods at the cash price and as described above to you, and **delivery will be given to the Hirer on your behalf** on your acceptance of the transaction. I/we further agree that this invoice shall be considered *pro forma* until notification of acceptance is received by us
> (emphasis is mine).

KKH 10 is addressed to the plaintiff for the account of the 1st defendant, and the said goods according to KKH 11 was to be delivered to the hirer on behalf of the plaintiff. So, taking the two documents together, the hirer referred to in KKH 11 can be no other than the 1st defendant. According to paragraph 7 of the defence of the 1st defendant and paragraph 8 of the amended defence of the second defendant, it was the first defendant who paid the down payment of RM81,000 to the dealer in respect of the said goods. This is the cash initial payment mentioned in the agreement under the Table of Payments appearing on the last page therein. As regards the balance of RM190,000 over the dealer's price of RM271,000, this is evidenced by exhibit KKH 12 to the supporting affidavit of the plaintiff that it was paid by the plaintiff to the dealer and it was so admitted by the 1st defendant in paragraph 8 of his defence and paragraph 10.3 of his affidavit in opposition affirmed on 26 September 1991. So there is beyond doubt that the 1st defendant intended to contract with the company of the plaintiff and had so contracted by his signing of the agreement in KKH 2 through the company by then had changed its name from Malaysia Borneo Finance Corporation (M) Berhad to

MBf Finance Berhad. So it does not speak well for the 1st defendant to dispute that he was not contracting with MBf Finance Berhad. If further evidence is required, the guarantee agreement, KKH 3 which the 2nd defendant has bound herself, is an agreement between the second defendant and MBf Finance Berhad citing the hire purchase agreement number which KKH 2 is concerned with. Also, on the 1st defendant's copy of the agreement exhibited as TKK 1 to the affidavit in opposition of the first defendant, MBf Finance Berhad with its Kuching address was stamped on the top first page of the agreement. It is rather unfortunate that the plaintiff has opened the room for argument by the defendants for not having prepared a proper form of agreement such as KKH 2 by changing its name into MBf Finance Berhad as the party to the agreement. The form is a printed one which must have been used during the time the plaintiff was under its old name but when the change of name took effect the plaintiff did not bother to have the forms modified accordingly as relate to its name. In the circumstances, I am satisfied that this issue is no longer triable.

The defence of the defendants raises also the issue involving the interpretation of various laws. I will now dispose the matter and decide whether there is any triable issue raised by the defendants to disentitle the plaintiff for a summary judgment under O. 14 Rules of the High Court on this issue of law. Firstly, the plaintiff maintains principally that the agreement is not subject to the Hire Purchase Act 1967 as the said goods are not goods as specified in the 1st Schedule to the Act to resist the defence that the agreement is void and unenforceable owing to various non-compliances with the provisions of the Act. If the agreement is not governed by the Act then the various defences of the defendants become non-issue. According to s. 1(2) of the Act, it is applicable only in respect of hire purchase agreements relating to the goods specified in the First Schedule. The 2 units planers, 1 unit scraper machine, 2 units automatic turning lathe are clearly not within the First Schedule. What is left is therefore the 4 units forklifts. The plaintiff says that they are not motor vehicles as listed in the First Schedule but the defendants say they are. According to the First Schedule, the motor vehicle, in as far as this matter before the Court is concerned must be goods vehicle (where the maximum permissible laden weight does not exceed 50 cwts). Exhibit KKH 18 annexed to the Affidavit In Reply of the plaintiff affirmed on 8 November 1991 is a letter from the Counsel for the plaintiff to the Director, Road Transport Department, Kuching dated 11 October 1991 wanting to know the maximum permissible laden weight specified for forklifts of the models specified for the said goods the subject matter of the agreement. By a letter dated 31 October 1991 in Bahasa which certified true translation is exhibited as evidence the reply came from the said Director exhibited as KKH 19 to the said affidavit as follows:

> Messrs. Loke, King & Co.,
> Advocates,
> P.O. Box 2457,
> 93748 Kuching.
>
> Dear Sirs,
>
> Re: Laden Weight for "Forklift"
>
> Thank you for your letter FT/js/M729/90 dated 11 October 1991.
>
> For your information, this Department is only responsible for maximum permissible laden weight for goods vehicles only.
>
> A "forklift" is not considered as one of goods vehicles. For registration purposes, a "forklift" is classified as "mobile machinery" and not "goods vehicles".
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> If you do not quite understand the phrase "laden weight", please see the definition for "unladen weight" in s. 2, Road Transport Act 1987. So "laden weight" means weight of load plus the unladen weight.
>
> That is all.
>
> "SERVING THE COUNTRY"
>
> Yours faithfully,
>
> sgd. (HENRY S.C. CHAN)
> for the Director,
> Road Transport Department,
> SARAWAK.

It is clear from the reply received from the road transport authority that a forklift is not a motor vehicle. Since it is not a motor vehicle, the question of its laden weight does not any longer arise for determining whether or not the 4 units forklifts included in the said goods are items within the First Schedule to the Hire Purchase Act 1967. They are not, and therefore the agreement is not caught by the Hire

Purchase Act 1967. That being the position, the various defences by the defendants concerning the Act become non-issue.

Though it is not a hire purchase within the province of the Hire Purchase Act 1967, any other hire purchase instrument involving movable property is required by s. 4 of the Hire Purchase Registration Ordinance of Sarawak (Cap 71) to be registered. Both the defendants in their respective defence alleged that the agreement in question is not enforceable on the ground that it was not registered as such, as there does not appear on the hirer's copy of this fact of registration. At paragraph 7.1 of the affidavit in opposition affirmed on 26 September 1991 for the 1st defendant, it states that the agreement does not have endorsed on it a rubber stamp chop identifying the registration number and date of registration. It only bears RM3 worth of stamp cancelled by the Registrar. The answer is to be obtained in paragraph 5 of the affidavit of Robin Wee Ewe Teck for the plaintiff affirmed on 28 September 1991 which states that the agreement and the guarantee agreement were contained in one single document which was duly registered with the Registrar on 20 April 1989 as shown by the endorsement made at the foot of the guarantee agreement which is KKH 3. Exhibit KKH 9 to the affidavit in support of this application by the plaintiff is a letter from Robin Wee Ewe Teck for the plaintiff to Kementerian Perdagangan dan Perindustrian, Kuching dated 20 April 1989 forwarding the agreement for registration. The registration fee of RM5 was acknowledged *vide* receipt No. F 901187 dated also 20 April 1989. It is to be noted that the Ordinance while requiring a hire purchase agreement to be registered, does not require a guarantee agreement arising therefrom to be registered. In the circumstances, in the light of KKH 9, the evidence in the said paragraph 5 of Robin Wee Ewe Teck's affidavit, and the fact of endorsement by the Registrar at the foot of the guarantee agreement, I hold that this hire purchase agreement had been duly registered pursuant to the Hire Purchase Registration Ordinance of Sarawak (Cap 71). So, again this issue is not triable.

Also, the defendants contends that the agreement is not enforceable against them as it was not executed in the manner required by the Companies Act 1965 in the sense that it was not signed by the Directors of the plaintiff and the common seal of the plaintiff not attached thereto by the plaintiff. At paragraph 7.3 of the 1st defendant's affidavit in opposition affirmed on 26 September 1991 it went further to state that there is nothing in the agreement to suggest that the unnamed signatory is in fact authorised to sign the agreement under the authority of a resolution of the Board of Directors of Malaysia Borneo Finance Corporation (M) Berhad. Robin Wee Ewe Teck for the plaintiff in his affidavit affirmed on 28 September 1991 who was the witness to the signing of the agreement said that the signature is that of Chua Chai Hua the then Branch Manager of the plaintiff. Being the representative of the plaintiff, I am of the view that Mr. Chua Chai Hua had the implied authority of the plaintiff and this agreement is of the nature that no seal of the company is required. See s. 35(5) of the Act. Hence, this issue is not triable.

In his defence at paragraph 9, the 1st defendant alleged that the agreement in fact is a bill of sale pursuant to the Bill of Sale Ordinance (Cap 68) of Sarawak and for failure to attest and register the agreement in accordance and in pursuance of the Ordinance, the agreement is void. He relied on an invoice No. HSH 1859/89 dated 30 March 1989, which is KKH 10, issued by the dealer mentioned above. I have held earlier that this agreement was registered according to the Hire Purchase Registration Ordinance of Sarawak (Cap 71), not because it was a bill of sale but because it is a hire-purchase agreement though not one governed by the Hire Purchase Act 1967. I will now proceed to decide whether this agreement is a bill of sale as contended by the defendants.

I have touched on exhibit KKH 10 at paragraph 16 above when dealing with issue of the parties to the agreement. Without having to repeat them as to the background, I would merely say that according to paragraph 7 of the defence by the 1st defendant, the 1st defendant says that to show his good faith and to confirm that it will hire the said goods through a hire-purchase agreement from the plaintiff, it paid a down payment of RM81,000 to the dealer. It is in evidence that the balance of RM190,000 was paid by the plaintiff. Such being the case, the dealer received the price for his goods from two sources, that is, from the 1st defendant and the

plaintiff. So the contention of the defendants that the payment of the balance sum of RM190,000 by the plaintiff to the dealer amount to a loan to the dealer by way of the dealer pledging the 1st defendant's goods as security to the plaintiff without interest and in return for which the dealer granted title and property in the said goods to the 1st defendant does not hold any weight at all. In any hire purchase transaction with a financier like the plaintiff, it is always the case that the financier will not normally undertake to finance for the full price of the goods the subject matter of a hire-purchase agreement. The hirer is normally required to bear a certain percentage of the total cash price of the goods leaving the balance to be financed under the hire-purchase agreement with the financier. So in this case that percentage of the cash price of the goods is the sum of RM81,000 paid by the 1st defendant to the dealer. By this transaction, it does not mean that the dealer had granted exclusive title and property in the said goods to the first defendant as alleged by it. The title to the property initially vested in the dealer as the original owner of the said goods to be sold at the price of RM271,000. This price was paid subsequently to the dealer when the dealer received the sum of RM81,000 from the 1st defendant and the balance of RM190,000 from the plaintiff. Hence, the dealer had divested its title to the goods in question on the receipt of the price for the goods. In whom now the goods has vested? To my mind the title to the goods legally has vested jointly in the 1st defendant and the plaintiff according to the proportion of the payments made by both of them. It does not belong to any one of them to the exclusion of the other.

According to one of the definitions of the term "bill of sale" in the Ordinance as provided by s. 3 is as follows:

> 'bill of sale' also includes agreements for the hire of personal chattels entered into for the purpose of securing the repayment to the lessor of such chattels of money advanced by him to the hirer, and the hirer shall in every case be deemed to be the grantor of the bill of sale and the lessor shall be deemed to be the grantee thereof.

The operative words in the definition is "the lessor of such chattel". It connotes the exclusive title to such chattel being in the lessor upon which he can assign, transfer, create a trust, etc. Personal chattel is defined by the Ordinance to mean *inter alia*, goods, furniture and other articles capable of complete transfer by delivery. So, by this definition, in order for the agreement in this case to be construed as a bill of sale the plaintiff or the first defendant must be having exclusive title in the said goods to the exclusion of the other. But as stated earlier, the title to the said goods in this case is not exclusive to the plaintiff or the 1st defendant and in the circumstances, the agreement in question is not a bill of sale. In the premises, the argument by the 1st defendant on this issue must fail. So there is no issue in this respect to be tried.

In the defence, the 1st defendant also disputes the quantum of the claim by the plaintiff on the ground that the plaintiff has failed to mitigate the loss suffered pursuant to s. 75 of the Contracts Act 1950. The plaintiff in reply to the defence so raised, at paragraph 12 denied the allegation saying that by a letter dated 29 October 1990 to the first defendant the plaintiff demanded the first defendant to deliver up the said goods to the plaintiff but it failed or refused to do so. Further, the plaintiff was not able to repossess the said goods as they were not kept at the address given in the agreement and could not be located. Clause 5 of the agreement stipulates that in the event of default by the first defendant in punctually paying the sum payable under the agreement, the plaintiff can without notice terminate the agreement or by written notice to the first defendant forthwith determine the contract and the first defendant shall forthwith at its expense deliver up the said goods to the plaintiff and the plaintiff shall be entitled without notice to seize and take possession thereof. The consequence which flows from this clause in the agreement is that on the happening of the event, the said goods will come back into the possession of the plaintiff either by the first defendant delivering up the said goods to the plaintiff or the plaintiff would seize or take possession thereof. In this case, by the said letter which is exhibited as KKH 5 to the affidavit in support of the plaintiff, it becomes the duty of the 1st defendant to deliver up the goods to the plaintiff. So, for the first defendant's failure to deliver up and the plaintiff's failure to seize or take possession thereof for the reason given by the plaintiff, the plaintiff cannot be faulted. In the circumstances this ground

also fails to raise any triable issue. In any event s. 75 of the Contracts Act is irrelevant in this respect as the section refers to cases of liquidated damages and penalty imposed in the contract between the parties in the event of breach. If the stipulation for increased interest from the date of default, in this case of 2% *per mensem* over delay in payment can be construed as a penalty, the first defendant cannot be absolved of his obligation for, the plaintiff is still entitled to receive reasonable compensation. As to the amount of reasonable compensation, it is dependent on whether or not he is required to mitigate his loss. I am satisfied with the explanation given by the plaintiff that it was not able to take possession of the said goods on the ground that the said goods could not be traced at the address given by the first defendant in the agreement. On the other hand the 1st defendant had not discharged his obligation under the agreement in returning the said goods to the plaintiff on termination of the agreement by the plaintiff. Therefore, this issue is also not triable.

Further, the defendants contend that the agreement relating to the payment of the initial deposit for the price of the said goods by the first defendant, the terms of the monthly instalment payments, and the interest on the overdue hire rentals or other payments at the rate of 2% per calendar month are not duly accepted or agreed upon by the parties to the agreement by signature or signing the initial thereon and as such they were never incorporated in the agreement by acceptance. I find it hard to accept this contention. They form part and parcel of the agreement. The first defendant admitted to the signing of the agreement in KKH 2. Though the pages to the agreement comprised in three pages are not numbered but they run in sequence and the parties had signed on the last page of the agreement. So it is vexatious on the defendants' part to say that just because no signatures or initials appear against the respective clauses, they do not form part of the agreement. So, this is again not a triable issue.

So much for the common defence put up by both defendants. As for the second defendant who is a party to the "Guarantee and Indemnity of Hire Purchase Agreement" in KKH 3 to the supporting affidavit of the plaintiff ("the guarantee agreement"), she undertook to jointly and severally guarantee all the obligations of the first defendant under the agreement. She also covenanted to jointly and severally to indemnify the plaintiff against all loss or damage the plaintiff may sustain under the agreement with the first defendant and that her liability under the guarantee shall not in any way be discharged, diminished or affected by the invalidity or unenforceability of the said agreement with the first defendant. In her defence to the claim by the plaintiff she pleaded that her agreement with the plaintiff is void in that the agreement contained material misrepresentation about the principal agreement. The alleged material misrepresentation is over the address of the first defendant. This is contained in paragraph 3.2 of her defence. She filed no Affidavit In Opposition to this application of the plaintiff. No submissions were made by Counsel over this matter either before the learned Deputy Registrar or before me on this appeal. However, the learned Deputy Registrar in her ruling held that to be non-issue. The address of the first defendant appearing on KKH 3 (the guarantee agreement) being of Lot 1083, s. 66, Pending Industrial Estate, Kuching, was in fact the address given by the first defendant on the application for hire purchase finance which is KKH 8. At any rate the second defendant herself stated on KKH 3 that her employer was Forward Enterprise, the first defendant, which address was Lot 1083, Bintawa Industrial Estate, Kuching. So I cannot agree more with the learned Deputy Registrar on her finding. In the circumstances, this cannot be a triable issue at all.

In the light of the above, I am satisfied that the 1st and 2nd defendant have failed to raise any triable issue to defeat the plaintiff's application for summary judgment under O. 14 Rules of the High Court, as both the defendants have no defence to the action by the plaintiff. I, therefore, confirm the decision of the learned Deputy Registrar on this.

Application to strike out the first defendant's counterclaim under O. 18 r. 19 Rules of the High Court

The counterclaim of the 1st defendant is involved in two matters. One is in relation to the plaintiff's claim in the action and the other is related to the dealings between the plaintiff and the "first defendant's trading under the name and style of Borneo Welded Mesh". The

1st defendant in this present action is sued in the capacity of trading under the style of Forward Enterprise. So, if there is going to be a counterclaim by Borneo Welded Mesh, there must first be a claim by the plaintiff against it. In this case there is none. So, Borneo Welded Mesh is a stranger to the action. The mere fact that Ting Kah Kuong is concerned with other firms than Forward Enterprise and the mere fact that the plaintiff had dealings with Ting Kah Kuong's other firms, if Forward Enterprise is sued by the plaintiff, as in this case, Ting Kah Kuong trading under the name and style of Forward Enterprise cannot counterclaim against the plaintiff in the suit, in respect of the plaintiff's dealings with Ting Kah Kuong's other firms. He may be the same person in all the firms concerned but the identity of each of the firm is distinct. Therefore, in this present action it is not proper for the present 1st defendant to counterclaim against the plaintiff over the plaintiff's dealings with the Borneo Welded Mesh. Borneo Welded Mesh has to file a separate action against the plaintiff citing the plaintiff as the defendant and the 1st defendant trading under the name and style of Borneo Welded Mesh as the plaintiff. The present 1st defendant cannot on behalf of Borneo Welded Mesh in his action with the plaintiff counterclaim against the plaintiff in this action. On this score the counterclaim by the 1st defendant in respect of dealings between the plaintiff and Borneo Welded mesh is clearly vexatious and an abuse of the process of Court. In the circumstances that part of the counterclaim of the 1st defendant against the plaintiff is struck out with cost to the plaintiff. There remains, therefore, only in respect of the 1st defendant's counterclaim against the plaintiff in relation to this action by the plaintiff against the 1st defendant to be reckoned with.

Paragraphs 16 and 17 of the counterclaim of the 1st defendant hinged on his contention that the plaintiff's lack of title in the said goods and therefore, counterclaim for the sum of RM53,664 paid by him to the plaintiff under the agreement as a debt due to him under s. 30(2) of the Hire Purchase Act 1967. As I have ruled at paragraph 19 above, that the Hire Purchase Act 1967 is not applicable to the agreement in question, this issue therefore, does not arise. I, therefore, fully agree with the learned Deputy Registrar that this part of the 1st defendant's counterclaim discloses no reasonable cause of action and is vexatious. I agree with the learned Deputy Registrar that paragraphs 16 and 17 of the counterclaim, therefore, should be struck out. I, therefore, strike out the paragraphs accordingly.

Next comes to the issue of the counterclaim as is found in paragraph 18. The 1st defendant in relation to this paragraph prays for various orders as stated at paragraph 10 above.

Those prayers are sought on the basis that the plaintiff had a duty to mitigate its alleged loss. In the light of what I said on this issue earlier at paragraph 25 above, this part of the counterclaim is again clearly unarguable, frivolous and vexatious. In agreement with the decision of the learned Deputy Registrar, I accordingly strike out the counterclaim in the said paragraph.

In the event the whole counterclaim of the 1st defendant is without any basis and I, therefore, allow the application of the plaintiff under O. 18 r. 19 Rules of the High Court. To that extent the decision of the learned Deputy Registrar striking out the 1st defendant's counterclaim in part is varied as the remaining part cannot subsist.

Decision in the appeal:

The appeal by the defendants against the decision of the learned Deputy Registrar is hereby dismissed with costs to the plaintiff to be taxed unless agreed. The order of the learned Deputy Registrar for the entry of final judgment under O. 14 against the 1st and 2nd defendants in the sum of RM198,711.88 with interest of 2% per calendar month from 14 November 1990 until full and final settlement, is hereby affirmed. The decision of the learned Deputy Registrar on the counterclaim of the first defendant is varied in the sense that the whole of the counterclaim by the 1st defendant is struck out.

Reported by Shamsiah Begum Subhan